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## FEDERAL TRADE COMMISSION

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INTRODUCTION

PAGE

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BY MS. HARRINGTON-MCBRIDE

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For The Record, Inc.

Waldorf, Maryland  
(301) 870-8025

1 FEDERAL TRADE COMMISSION

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4 IN THE MATTER OF: )

5 CAN-SPAM REPORT TO CONGRESS. )

6 ) Matter No.:

7 ) P044405

8 )

9 -----)

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11 TUESDAY, JULY 26, 2005

12 AFTERNOON SESSION

13 Federal Trade Commission

14 600 Pennsylvania Avenue, N.W.

15 Washington, D.C. 20580

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17 The above-entitled matter came on for  
18 conference, pursuant to agreement, at 3:08 p.m.

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Waldorf, Maryland  
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1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 CATHERINE HARRINGTON-MCBRIDE, ESQ.

5 MICHAEL DAVIS, ESQ.

6 ALLYSON HIMELFARB, INVESTIGATOR.

7 600 Pennsylvania Avenue

8 Washington, D.C. 20058

9

10 ALSO PRESENT VIA TELEPHONE:

11 LINDA SHERRY, Consumer Action

12 JEAN ANN FOX, Consumer Federation of America

13 KENNETH DEGRAFF, Consumers Union

14 SUSAN GRANT, National Consumers League

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1 P R O C E E D I N G S

2 - - - - -

3 MS. HARRINGTON-MCBRIDE: Hi, everybody. This is  
4 Katie Harrington-McBride. I'm indeed joined here at the  
5 FTC by Allyson Himelfarb, by Mike Davis, an attorney in  
6 marketing practices, the division that I work in, and by  
7 Danielle Motts, an intern that's working with us this  
8 summer.

9 Thank you all very much for joining the call. I  
10 don't know that everyone who we've invited to join is  
11 actually on yet, so I'll just begin going through our  
12 preliminaries, and hopefully by the time, in another  
13 four minutes or so when we're ready to start the  
14 substantive portion of the call, everybody will be here.

15 THE SPRINT OPERATOR: Excuse me, ma'am. I'm  
16 sorry to interrupt, but the call is being recorded.

17 MS. HARRINGTON-MCBRIDE: Thank you. I was going  
18 to make that disclosure. We're not trying to submarine  
19 anybody. Why don't I go ahead and take roll, make sure  
20 I know who is and is not on the call. Linda sherry, are  
21 you here from Consumer Action?

22 MS. SHERRY: I am indeed.

23 MS. HARRINGTON-MCBRIDE: Great, welcome.

24 MS. SHERRY: Thank you.

25 MS. HARRINGTON-MCBRIDE: Ken McEldowney?  
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1 MS. SHERRY: I'm not sure that Ken is going to  
2 call in, but if he is, he's going to call in very soon.

3 MS. HARRINGTON-MCBRIDE: Great. Jean Ann Fox  
4 from CFA?

5 Kenneth DeGraff?

6 MR. DEGRAFF: Yes, I am here.

7 MS. HARRINGTON-MCBRIDE: Great, Hi.

8 MR. DEGRAFF: Thank you.

9 MS. HARRINGTON-MCBRIDE: Susan Grant.

10 MS. GRANT: Hello. How are you?

11 MS. HARRINGTON-MCBRIDE: I'm fine, Susan. How  
12 are you? Nice to hear your voice. And Sharon  
13 Hermanson?

14 It sounds like we're just waiting for a couple  
15 of people, but I'll go ahead and get through the  
16 drudgery first, and then we can begin what I expect will  
17 be a very interesting discussion, the CAN-SPAM Act and  
18 its effectiveness.

19 As you all know, in September of 2003, Congress  
20 enacted and The President signed the CAN-SPAM Act, which  
21 among other things directed the FTC to draft a report  
22 two years out on the effectiveness and enforcement of  
23 the Act, and so the clock is ticking, and our report is  
24 due this coming December 2005.

25 Staff has been busy gathering data since the  
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1 passage of the Act, base line data initially and all  
2 reports we could get our hands on and any data that  
3 might demonstrate how effective the Act has been.

4 This interview today, with professionals who  
5 represents consumers, will be transcribed for the  
6 record, and will be part of the record for the report.  
7 Today's interview is just one of several ways that the  
8 FTC is seeking information that would be relevant to the  
9 report on the effectiveness and enforcement of the Act.

10 Because today's call is being transcribed for  
11 the record and separately recorded in case of any sort  
12 of technical failing, we ask that if you wish to speak,  
13 you began by stating your name and your organization. I  
14 think we're on small enough call today that probably  
15 first name will do, but if you could remember to  
16 introduce yourself, that will help us very much in  
17 creating an accurate record that reflects who said what.

18 Just to be absolutely clear, your views  
19 expressed here today will be transcribed for the record  
20 and may be appended to the report to Congress or  
21 otherwise made public, just so everyone is clear on  
22 that. Are there any questions before we begin?

23 (Discussion off the record.)

24 MS. HARRINGTON-MCBRIDE: We'll begin today, and  
25 I'll give you a brief overview of what it is that we're  
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1     trying to accomplish and so far we've been able to bring  
2     these calls in under two hours, sometimes by only a  
3     minute or two, but we're eager to hear your thoughts  
4     today on four main topics, the first of which is a  
5     question that Congress has asked us to analyze in our  
6     report; that is: Are there any marketplace developments  
7     or technological changes since the passage of the Act in  
8     December of 2003 that may affect the practicality or  
9     effectiveness of the Act?

10           And we'll talk a little bit about what that  
11     might include when we get to that topic just to give you  
12     a sense, but that's the first of four topic that we're  
13     going to cover.

14           Secondly, we'll talk about the extent to which  
15     transmission of international Email may affect the  
16     effectiveness of the Act and any suggestions for change.

17           Thirdly, we'll tackle ways in which consumers,  
18     particularly children, can be protected from obscene and  
19     pornographic Email material. Finally we'll end by  
20     discussing the effectiveness of the various provisions  
21     of the Act.

22           For each of these four areas, I'll ask a series  
23     of questions. My colleagues here may also ask  
24     questions, and to be honest with you, if any of you have  
25     questions you would like to throw into the mix, you're  
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1 more than welcome to do that. We mean for this to be a  
2 fairly open dialogue.

3 I will have to, as we often do at various  
4 workshops, be somewhat of a time keeper, but other than  
5 that, we really are eager to hear your thoughts on this,  
6 and those can come in the form of questions or answers.

7 We'll go ahead and take the first issue, which  
8 is: Are there any marketplace developments or  
9 technological changes since the passage of the Act that  
10 may affect its practicality or effectiveness?

11 Here again, just to break it down into  
12 manageable chunks. One thing we're wondering is, are  
13 there new or increasingly used methods by which  
14 consumers receive their Email? That is a specific area  
15 that Congress wanted to us look into, and what we  
16 presume that means, although don't be limited by our  
17 presumption, is: Are consumers increasingly using  
18 mobile devices like cell phones and PDAs to access their  
19 Email, and, if so, does that have any impact on how  
20 effective the CAN-SPAM Act can be?

21 MS. SHERRY: That's an interesting question.

22 MS. GRANT: This is Susan Grant from National  
23 Consumers League. I'm at a conference in Florida, and  
24 so I'm not at my desk with access to my documents, but  
25 we recently did a survey of consumer's use of various  
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1 kinds of communications technologies, and we know from  
2 that a number, which I don't have at my disposal, of  
3 people who said that they had access to the Internet  
4 through their cell phone, but we didn't ask any  
5 questions that would give us the answer to how has this  
6 increased, if it has, from some previous point of time.

7 MS. HARRINGTON-MCBRIDE: Okay. This actually  
8 gives me a good opportunity, Susan, this is Katie, to  
9 say that while we do hope to get a lot out of our two  
10 hours, we don't want to discourage you from  
11 supplementing the record by providing us additional  
12 information after the call.

13 So if there's something you think of later or if  
14 there's some number that you can't put your hands on  
15 now, you should feel free to transmit it to any of us  
16 here at the FTC working on the project, and we'll give  
17 you some contact information at the end of the call. So  
18 it will be interesting to see more about that study,  
19 Susan.

20 MS. GRANT: Thanks.

21 MS. HARRINGTON-MCBRIDE: Is there any other data  
22 that anyone's aware of about the increased usage of  
23 global devices or other unique ways of getting Email  
24 that weren't so prevalent back in December of 2003?

25 MS. SHERRY: This is Linda Sherry speaking. May  
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1 I ask, would they be excluded from the CAN-SPAM Act?

2 MS. HARRINGTON-MCBRIDE: Not necessarily. It  
3 really depends definitionally whether or not they would  
4 fit in, but I presume that what Congress is getting at  
5 here is that they recognize that technology is very fast  
6 moving, and that any legislation runs the risk of  
7 becoming obsolete, unless it's fairly broadly drafted.  
8 I think what they're asking us to do is at this two year  
9 mark, to try to opine as to whether or not any portion  
10 of the Act has either become obsolete or simply was  
11 never drafted in such a way as to catch some new or  
12 emerging technology.

13 Obviously we're doing additional research beyond  
14 these calls, but we feel like there's a huge benefit  
15 with talking with interested parties who may have access  
16 to data that we simply have not gotten ahold of, so  
17 that's why we asked.

18 MS. SHERRY: Because text messages are not per  
19 se Emails, but there's other laws that prohibit the  
20 sending of unsolicited text messages to wireless  
21 devices.

22 MS. HARRINGTON-MCBRIDE: Right, exactly. One  
23 question in this regard is really -- whether you can  
24 imagine that some of the subject line labeling in  
25 conjunction with the sexually explicit labeling  
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1 provision that the Act requires and that the FTC did a  
2 rulemaking on whether that could be of limited  
3 effectiveness, if, for example, consumers are now  
4 routinely view Email on a screen so small that they  
5 don't allow for the full display of certain disclosures  
6 or certain warnings.

7 MS. GRANT: This is Susan Grant from National  
8 Consumers League again. I don't know how much  
9 difference that makes because even on my own computer, I  
10 am not seeing the labeling, for instance, of adult  
11 content that the FTC rules require.

12 MS. SHERRY: Exactly. I'm not either.

13 MS. HARRINGTON-MCBRIDE: Is that because you're  
14 not able to view it for some technological reason or  
15 because it's not there?

16 MS. GRANT: I don't think it's being complied  
17 with.

18 MS. SHERRY: It's not there.

19 MR. DEGRAFF: The only technological development  
20 that I have seen that might have an impact on the law,  
21 is the new Sender ID program that Microsoft is  
22 developing, and while its implications to CAN-SPAM are  
23 narrow, it might have potential broad deceptive trade  
24 practice and anti-competitive concerns for the  
25 Commission, particularly if Microsoft attempts to patent  
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1     and give exclusive licenses with the intention of it  
2     becoming the new Internet standard to replace the  
3     current outgoing mail protocols.

4             MS. HARRINGTON-MCBRIDE:   Okay.

5             MR. DEGRAFF:   I think the Commission needs to  
6     have a look at that and figure out what's going on  
7     because obviously having one particularly very powerful  
8     company owning the patent for a new outgoing mail  
9     standard, might dramatically impact the future of spam  
10    and the future of the computing industry.

11            MS. HARRINGTON-MCBRIDE:   Kenneth raises a point  
12    that I was just about to get to, which is we've talked a  
13    little bit about whether there are any technological or  
14    marketplace developments that have brought on board new  
15    technology for viewing Email, but it seems to us that  
16    another area where we might want to explore is whether  
17    there are changes regarding authentication schemes  
18    affecting the practicality or effectiveness of the  
19    Act.

20            We note that Kenneth's concern is somewhat  
21    beyond the scope of the Act, but it is nonetheless  
22    noted.   But are there any concerns that the currently  
23    proposed authentication scheme could impact the  
24    effectiveness of the Act, or do you have any other  
25    comments about the way in which they might be  
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1 supplemental to or complementary of the Act?

2 MS. GRANT: This is Susan Grant from National  
3 Consumers League. I'm not sure if this is relevant to  
4 looking at the CAN-SPAM Act, but I think there are still  
5 concerns about any authentication methods that might be  
6 developed interfering with people's ability to freely  
7 use and anonymously use Email, and it's difficult to  
8 strike the balance between trying to prevent things like  
9 spam and phishing and changing the very nature of Email  
10 communication to be something where people have to give  
11 up more personal information in order to do it and  
12 expose themselves more when, for whatever legitimate  
13 reason, they may not want to do so.

14 MS. HARRINGTON-MCBRIDE: Okay. What about  
15 changes to Email filtering policies at ISPs or Email  
16 filtering products that consumers can install  
17 themselves? Are there any ideas, any developments or  
18 changes since the passage of the Act, and if so do any  
19 of them impact the effectiveness of the Act or its  
20 enforcement?

21 MR. DEGRAFF: Let me think about that.  
22 Consumers Union and the testers at Consumers Reports  
23 Magazine have seen an increase in filtering on web-based  
24 Email services, and unfortunately add-on products do not  
25 typically work with those services. Even factory  
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1 installed programs like those from Microsoft and Apple  
2 are including new filtering tools that are beginning to  
3 help increase or are beginning to help stem the tide of  
4 spam in user's inboxes.

5 MS. HARRINGTON-MCBRIDE: Okay.

6 MS. GRANT: This is Susan Grant from National  
7 Consumers League. The only downside of that is that  
8 some people may find themselves increasingly being  
9 erroneously blocked.

10 MS. HARRINGTON-MCBRIDE: Okay. One piece of  
11 information that we've run across in our studies over  
12 the last few weeks has been a recent study by the Pew  
13 Organization that found that while the volume of Email  
14 has increased since the passage of CAN-SPAM, that the  
15 frustration of recipients is somewhat lessened.

16 I wonder if anyone has any thoughts about what  
17 to make of that finding.

18 MS. SHERRY: I think that points to the work  
19 the ISPs are doing in terms of helping people screen  
20 their Emails.

21 This is Linda Sherry from Consumer Action

22 MS. HARRINGTON-MCBRIDE: Thank you, Linda.  
23 Thank you.

24 (Brief Technical Difficulty with Conference  
25 Call.)

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1 MS. SHERRY: So it seems like that there's a  
2 back door then, and certainly why would they comply with  
3 the rules governing spam if they're getting in the back  
4 door in the first place and taking over people's  
5 machines and sends out Emails.

6 MS. HARRINGTON-MCBRIDE: Right, and people are  
7 going to provide a perfect quote for non compliance.

8 MS. SHERRY: Exactly.

9 MS. GRANT: This is Susan Grant from National  
10 Consumers League. I think it makes it really hard for  
11 people to know who's really behind this spam that  
12 they're getting and may discourage them from reporting  
13 it or may end up with people being accused of sending  
14 spam when, in fact, it's not them.

15 I think it may also have the effect of  
16 scaring people about using their computers when you see  
17 that you are, for instance, getting stuff that is  
18 clearly not something that the person whose name is on  
19 the message as the sender would have sent you.

20 I know that I get spam on my work computer,  
21 which I don't filter precisely to see what's going on,  
22 from organizations pretending to be Privacy Rights  
23 Clearinghouse and other organizations that I know are  
24 not sending it to me, and it's really frightening.

25 MS. HARRINGTON-MCBRIDE: It's somewhat  
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1       deliciously ironic.

2               MS. GRANT:   Yes.

3               MS. HARRINGTON-MCBRIDE:   Okay.   Any other  
4       thoughts about any other marketplace development or  
5       technological changes that have occurred in the last  
6       year and a half or so that might affect the practicality  
7       or effectiveness of the Act?

8               MS. FOX:   This is Jean Ann Fox, Consumer  
9       Federation of America.

10              MS. HARRINGTON-MCBRIDE:   Hi, Jean Ann.

11              MS. FOX:   Hi.   I don't know if this is exactly  
12       what you're asking about, but I've been amazed at how  
13       much spam I get that isn't in words.   It's in little  
14       symbols or it looks like it's in other languages, and so  
15       the disclosures wouldn't mean much of anything.   Is  
16       that some strange permutation on spam?   Does anybody  
17       know?

18              MS. HARRINGTON-MCBRIDE:   Well, I hate to offer  
19       an expert opinion because I think I would be  
20       unqualified, this is Katie.   I think it can happen for a  
21       couple of reasons.   Sometimes when an Email is sent in  
22       HTML format, and the receiver's machine does not allow  
23       for viewing in HTML, you get some odd coding.

24              We certainly know there may be translation  
25       issues with Email that's sent in other languages and  
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1     then translated into English, but I think those are at  
2     least a couple of reasons why that can happen. I don't  
3     know whether or not it would be done intentionally for  
4     any reason.

5             MR. DEGRAFF: This is Kenneth at Consumers  
6     Union. Consumers are reporting an increase in foreign  
7     language spam including particularly German and  
8     Japanese, and I think the issue with that is that spam  
9     is easily able to bypass or spam filters that aren't  
10    searching for key words in German or Japanese, but the  
11    links are still good, and the links often lead to a  
12    website in English that allows you enter your personal  
13    or financial information, so they're still targeting  
14    English speaking consumers but with messages that are in  
15    different language, and I think trying to pique  
16    consumer's curiosity.

17            MS. FOX: This is Jean Ann. I'm getting both.  
18    I don't know why people think I can read Japanese.

19            MR. DEGRAFF: I don't think the spammer expects  
20    you to. I think the spammer expects you to be curious  
21    enough about why you got an Email in German or Japanese  
22    to actually click on the link.

23            MS. FOX: It's really strange.

24            MS. HARRINGTON-MCBRIDE: Okay. Let's tackle our  
25    second topic, and that is how to address commercial  
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1 Email that originates in or is transmitted through or to  
2 facilities or computers in other countries. You may  
3 remember, as you've read through the CAN-SPAM Act, at  
4 any point or especially recently that this is one of the  
5 things that Congress specifically wants the FTC to  
6 analyze and to make recommendations on, particularly any  
7 initiatives or policy positions that the United States  
8 government could pursue.

9 This is an area that you all probably know the  
10 FTC has done a lot in. We cooperate with international  
11 authorities on a variety of law enforcement matters and  
12 on education matters as well, and in the area of spam,  
13 we've been very active in the last three or four years  
14 to try to establish good education protocols around the  
15 world on securing servers and to ensure that, to the  
16 extent we can, we work cooperatively in investigating  
17 and bringing law enforcement action where we find  
18 defendants in other countries.

19 So we've worked in this area, but we want to be  
20 sure to report back to Congress as fully as we can on  
21 solutions that others may see or any comments you might  
22 have about some of the solutions that have already been  
23 forged in this area, so that's the set up for this.

24 I guess my first specific question is: To what  
25 extent does commercial Email that we receive here in the  
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1 United States actually originate in or get transmitted  
2 through other countries? Do you all know of any  
3 reliable stats that we should be looking at on this?

4 MS. GRANT: This is Susan Grant from National  
5 Consumers League. Because we operate a hotline where  
6 consumers can report telemarketing and Internet fraud to  
7 us, we have some information about some of the  
8 fraudulent solicitations that are made to them by Email  
9 and that are made by Emails that appear to be from other  
10 countries, and we can certainly submit some information  
11 subsequent to this phone call to you about that.

12 It appears that a lot of these Emails come from  
13 other countries, and that almost an equal number of  
14 fraudulent Emails that consumers get, they have no idea,  
15 in fact can't even guess where the culprits are, so I  
16 think it's probably a bigger problem than whatever  
17 number we have for the number of foreign crooks by  
18 Email.

19 We've certainly seen an increase in some  
20 particular categories of fraud emanating from other  
21 countries. The lottery solicitations by Email, the  
22 Nigerian money offers which more and more people are  
23 actually falling for, so I think it's a huge problem,  
24 and I know that the FTC has been working hard with  
25 countries around the world on cross border fraud.

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1           I'm sure that there's some progress that can be  
2     made and can continue to be made with helpful countries,  
3     countries that are equally concerned. I despair of some  
4     other countries like Nigeria where I truly don't know  
5     what we can do about that.

6           MS. HARRINGTON-MCBRIDE: Anybody else on data  
7     sources that we might use to ascertain the levels of  
8     spam coming from or through other countries.

9           MR. DEGRAFF: I haven't seen any data, but I  
10    will say that I think that the FTC has been handcuffed,  
11    Consumer Reports magazine will be reporting that in the  
12    September 2005 issue that the FTC has only been able to  
13    hire one investigator to combat spam since the passage  
14    of the law, and that it needs better enforcement  
15    capabilities not only domestically but also  
16    internationally as well.

17          MS. HARRINGTON-MCBRIDE: Okay.

18          MR. DEGRAFF: The FTC shouldn't have to stop  
19    investigating once the trail leads outside of the United  
20    States borders. The Internet is a global phenomenon,  
21    not just a domestic issue and it requires global  
22    enforcement against its rogue characters.

23          MS. HARRINGTON-MCBRIDE: Okay. One proposal  
24    that I would love to hear your reaction to is that one  
25    effective way to do this, and I think that we'll presume  
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1     that it's in Susan's ideal world where we're working  
2     with countries, like minded countries who want to solve  
3     this problem and are aggressively devoting resources to  
4     do so, but assuming that situation, could you see some  
5     use of using immediate economic restraints against  
6     spammers in other countries, presuming they can be  
7     identified, some sort of immediate economic restraint  
8     that could be somehow imposed leveraging existing  
9     banking systems?

10            These are just some proposals we've seen bandied  
11     about in the press, and I would be interested to hear  
12     your reaction, if that level of cooperation and sort of  
13     an immediate financial impact might be a useful strategy  
14     as a deterrent.

15            MS. GRANT: This is Susan Grant from National  
16     Consumers League. Do you mean actions like freezing  
17     assets?

18            MS. HARRINGTON-MCBRIDE: Yes. Yes, and also  
19     perhaps using the credit card privacy system, which also  
20     operates internationally, as a potential means of  
21     actually finding assets.

22            MS. GRANT: Yes. That would be really helpful.  
23     I think there also has to be more work done with the  
24     various companies that act as conduits for money being  
25     wired in response to these fraudulent Emails.  
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1 MS. HARRINGTON-MCBRIDE: Any other thoughts  
2 about the problems inherent in the international  
3 transmission of Email or suggestions about ways in which  
4 the CAN-SPAM Act could be more effective?

5 MR. DEGRAFF: Spam always has a money trail, and  
6 finding creative ways to address that critical link is  
7 essential for deterring and combating the spam epidemic.

8 MS. GRANT: This is Susan Grant from National  
9 Consumers League, one other thought here. I think we  
10 will see, as we have seen with telemarketing fraud,  
11 where the crooks have increasingly turned to using cell  
12 phones rather than land line phones and cell phones that  
13 they have obtained with information that they have  
14 stolen, ID theft, where they've used consumer's  
15 identities and credit card numbers to obtain that  
16 service.

17 I think we will probably increasingly see WI-FI  
18 and abuses of hot spots being used to perpetuate  
19 fraudulent spam scams, and I think that's going to make  
20 investigating and taking action against these spammers  
21 even more complicated than it already is.

22 MS. HARRINGTON-MCBRIDE: That actually reminds  
23 me of a question that I didn't explicitly ask, but what  
24 would your view be, this group, whether stricter  
25 standards for domain name registrars, whether that would  
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1 aid in addressing the spam problem, particularly  
2 internationally.

3 MR. DEGRAFF: I don't understand how that would  
4 curb spam internationally.

5 MS. HARRINGTON-MCBRIDE: Well, the idea I guess  
6 is sort of, I think you were saying, Kenneth, that there  
7 has to be a money trail.

8 MR. DEGRAFF: Sure.

9 MS. HARRINGTON-MCBRIDE: So the URLs that are  
10 clicked on in order to facilitate the ultimate payment  
11 transaction are registered somewhere, and to the extent  
12 that they're registered with false information, we know  
13 we have a technological impediment to finding spammers,  
14 but oftentimes there is a way to find them using the  
15 money trail.

16 One offshoot of the money trail is the domain  
17 name trails, who registered this domain, and to the  
18 extent that truthful information is put in at that stage  
19 of the game, it can be often be a real benefit to law  
20 enforcement, so stricter standards in that respect I  
21 guess would ensure that we have an additional method of  
22 finding those responsible for these scams.

23 MR. DEGRAFF: Absolutely. Are you talking about  
24 DOT COM? Are you talking about the American TLDs or  
25 international?

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1 MS. HARRINGTON-MCBRIDE: Internationally I  
2 think. It can certainly apply it in either arena.

3 MR. DEGRAFF: I know there is a growing concern  
4 about anonymous domain registries, like Domains By  
5 Proxy, but my understanding is that the underlying  
6 information is still subpoenaable, and that the company  
7 could keep that information private but would be able to  
8 divulge it to law enforcement.

9 MS. FOX: This is Jean Ann Fox from CFA. When  
10 we did our survey of Internet payday loan sites, we came  
11 across several of them that had anonymous domain  
12 registries, so that a consumer trying to figure out  
13 where the company was that they had given them access to  
14 their bank account, they would not be able to find that  
15 out. You might be able to do it by subpoena, but it  
16 doesn't help a consumer trying to straighten out a  
17 problem. The other aspect that we found was that even  
18 though the lender's web site would claim that they were  
19 in foreign countries, they would still have connections  
20 in this country and just a daisy chain of web sites and  
21 names. Of course these companies market with spam, and  
22 you never know whether it's a phishing attack or whether  
23 it's an actual lender.

24 MS. HARRINGTON-MCBRIDE: Right.

25 MR. DEGRAFF: That's a great point, Jean Ann.  
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1 MS. SHERRY: This is Linda Sherry. I agree  
2 totally with Jean Ann on that one.

3 MS. GRANT: This is Susan Grant from National  
4 Consumers League. At least for entities that want to be  
5 DOT COMs, I think that the registrars should be required  
6 to really try to get genuine information about who they  
7 are and make that available in the same way that most  
8 businesses have to register with the cities or towns or  
9 states that they operate in depending on the kind of  
10 business, so that they can be available for services of  
11 process. Are you still there?

12 MS. HARRINGTON-MCBRIDE: Yes, we are.

13 MS. GRANT: There was a weird noise on the  
14 phone. I think that's really important. I think where  
15 it gets more complicated maybe is when you have other  
16 kinds of domain names that might be used, and again I  
17 think that some people are concerned about privacy.

18 I think there are ways of getting around that,  
19 though. I mean, obviously if someone has a good reason  
20 why they want to keep the person who is behind a web  
21 site private, they can always have a lawyer or some  
22 other responsible figure serve as a representative for  
23 them so that at least a law enforcement agency would  
24 have a real person to deal with in trying to get that  
25 information.

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1           MR. DEGRAFF: This is Kenneth again at Consumers  
2    Union. I think that puts too tall of a barrier to allow  
3    for independent communications. I can think of whistle  
4    blowing examples where it might be where a user might  
5    want to register a domain but not have their name  
6    attached to it for legitimate purposes. I have no  
7    problem with making somebody ensure that the registrant  
8    is an actual person and who they say they are, but I do  
9    respect the need for Internet private and anonymous  
10   communication, and if the underlying domain registry  
11   information is subpoenaable, I'm okay with that.

12           MS. SHERRY: This is Linda Sherry, Consumer  
13   Action. Just so long as somebody somewhere can figure  
14   out who that underlying registrant is.

15           MR. DEGRAFF: Right, yes, exactly.

16           MS. SHERRY: Yes.

17           MR. DEGRAFF: Exactly.

18           MS. HARRINGTON-MCBRIDE: I forgot to check  
19   earlier, has Sharon joined the call, Sharon from AARP?

20           Okay. Let's move on to the third question that  
21   Congress has specifically asked the FTC to analyze in  
22   our report, and that is what protection exists for  
23   consumers including children from receipt and viewing of  
24   commercial Email that's obscene and pornographic, and  
25   here I guess we could presume that Congress means for us  
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1 to do some analysis on what we call our Brown Paper  
2 Wrapper rule, the sexually explicit labeling rule, that  
3 in April of 2004 the FTC promulgated pursuant to the  
4 CAN-SPAM Act.

5 That rule requires that each Email that contains  
6 sexually explicitly material be so labeled using a  
7 specific label the FTC came up with, and that in the  
8 initially viewable area of the Email, that no sexually  
9 explicit imagery be viewable.

10 How effective has this rule been in protecting  
11 consumers, including children, from receipt and viewing  
12 of pornography?

13 MS. GRANT: This is Susan Grant from National  
14 Consumers League. I think as some of us have said  
15 before, we haven't seen any tangible compliance with  
16 that so it doesn't seem to be very effective at this  
17 point.

18 MS. HARRINGTON-MCBRIDE: Any other thoughts on  
19 that rulemaking that we've done by the FTC?

20 MS. FOX: This is Jean Ann Fox from CFA. Can we  
21 ask you what kind of investigations or studies you have  
22 done to test the effectiveness of the rule?

23 MS. HARRINGTON-MCBRIDE: You certainly can ask.  
24 I have to tell you that some of this is still in  
25 process, and so I'm not at liberty to discuss specific  
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1 things that we're doing, but I can assure you that we  
2 are trying independently to study the effectiveness of  
3 the provisions of the Act.

4 I guess one answer to your question might be in  
5 last week's press releases from the FTC where the FTC  
6 has successfully brought I think seven cases that it's  
7 announced against those who have sent obscene or  
8 pornographic Email outside of the strictures of the  
9 rule, and so I think we may be more able to speak to the  
10 enforcement of it where there is not compliance.

11 MS. GRANT: This Susan Grant from National  
12 Consumers League again. This is one instance, one  
13 example of where I think predicating the consumer's  
14 rights on opt-in rather than opt-out would have been  
15 helpful, especially for things with adult content. This  
16 is really something that should only be sent to somebody  
17 when they have affirmatively subscribed to receive it,  
18 and it just shouldn't be allowed to be sent otherwise,  
19 labeled or not.

20 MS. HARRINGTON-MCBRIDE: Okay. While I noted we  
21 want to begin with the analysis of our rulemaking which  
22 was done pursuant to Congress's mandate, I think it's  
23 important to look beyond that as well and see what the  
24 state of the art is in July of 2005 and to see what, if  
25 anything, has changed in terms of private sector tools,  
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1       such as those that are made available by ISPs and Email  
2       service providers to shield their constituents from  
3       unwanted, obscene or pornographic Emails.

4               Are there any perceptible changes of this that  
5       you all are aware of?

6               MS. FOX: This is Jean Ann Fox at CFA.  
7       Certainly not on my ISP. I can't tell that anything is  
8       any better. My subscription to some services just  
9       expired, and I've been amazed at the quantity of stuff  
10      coming into my Email box. I haven't updated yet. I've  
11      just been watching what's been coming in, so obviously  
12      whatever screening was going on was being done by the  
13      extra services I had bought, not by my ISP.

14              MS. HARRINGTON-MCBRIDE: Okay.

15              MS. FOX: But I am in the low rent district down  
16      here.

17              MS. GRANT: You're not alone, Jean Ann.

18              MS. FOX: I'm looking at a spam that came in  
19      today from RIU.ENERGY@EE. I don't even know where EE is  
20      or what it is, whether that's a legitimate suffix on an  
21      address.

22              MS. HARRINGTON-MCBRIDE: It sounds like it's  
23      time to renew those subscription.

24              MS. FOX: I am. I have to get myself over to  
25      Costco and buy an updated one.

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1 MS. HARRINGTON-MCBRIDE: That's another part of  
2 the question. I guess we're looking at not only what's  
3 being implemented by ISPs, some of whom are reporting  
4 may have seen quite the success in stemming the tide of  
5 spam into their user's inboxes, but also what private  
6 sector solutions are consumers pursuing on their own, to  
7 guide them to a level that they consider to be accurate  
8 protection or to simply work around whatever web-based  
9 Email services they may be using.

10 MS. FOX: This is Jean Ann Fox, CFA. We're  
11 spending big bucks by combination services from  
12 companies like MacAfee or whoever else is providing them  
13 and resenting that we have to pay to update them on an  
14 annual basis. We would rather that you just make this  
15 all go away so we can enjoy using our Email.

16 MS. HARRINGTON-MCBRIDE: Now, with that clear  
17 mandate, I guess we'll just go take care of it.

18 MS. FOX: That's the magic wand there, right?

19 MS. SHERRY: This is Linda Sherry, Consumer  
20 Action. I realize it's real tricky, this whole thing  
21 trying to deal with this problem, but some clear kind of  
22 hand slap isn't going to do it.

23 MS. HARRINGTON-MCBRIDE: Okay. Are there any  
24 options for blocking obscene or pornographic Emails that  
25 you all are aware of that are particularly often used or  
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1     selected by consumers or to what extent do you have any  
2     data suggesting that, like Jean Ann I guess in the  
3     blocking of all Email, but to what extent are consumers  
4     specifically to block pornographic Email? Are they  
5     having to go out and supplement whatever services their  
6     ISP already has?

7             MS. GRANT: This is Susan Grant from National  
8     Consumers League. I don't have the answer to that  
9     question, and I'm sure that you will get some statistics  
10    from businesses in that regard, but it would be great if  
11    the FTC could also do a consumer survey that delved more  
12    deeply into what people are doing and why they're not  
13    taking advantage of tools that might be available to  
14    them, whether it's cost or whether it's confusion or  
15    whatever reasons there might be.

16            MS. HARRINGTON-MCBRIDE: In some previous  
17    interviews that we have done, what we've heard is that  
18    users, and I probably lump myself into this so this is  
19    not a pejorative, that users are not particularly  
20    sophisticated, and when it comes time to have to run  
21    software programs and to be vigilant against viruses and  
22    spam and to be able to execute all of on as sort of a  
23    reasonably sophisticated but not super sophisticated end  
24    user is challenging.

25            MS. FOX: You are talking about me again, aren't  
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1       you?

2                   MS. HARRINGTON-MCBRIDE: I resemble that remark,  
3       too, Jean Ann.

4                   MS. FOX: It is just too much work to make this  
5       a pleasant thing to use, and for those of us who work  
6       remotely and live and die by our Email, it's aggravating  
7       to have to spend the first 15 minutes of every working  
8       day clearing out the garbage.

9                   MS. HARRINGTON-MCBRIDE: Okay. Let's move on to  
10      the fourth topic, which is really just sort of a  
11      painstaking one by one evaluation of each provision of  
12      the CAN-SPAM Act and your thoughts about how effective  
13      and enforceable these provisions have been and any  
14      suggestions for change that you might have.

15                  I'll take the first two together, and those are  
16      the criminal provisions of the Act, which enable the  
17      Department of Justice to use various tools that they  
18      already have, and create specific new criminal law  
19      violations for certain practices associated with  
20      spamming, and then the criminal penalties, so are the  
21      criminal provisions adequate and are the penalties  
22      adequate?

23                  MS. SHERRY: Can you say that again?

24                  MS. HARRINGTON-MCBRIDE: Sure. I want to look  
25      first at the CAN-SPAM Act which has two distinct avenues  
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1     it pursues for remedying the spam problem. One is  
2     criminal provisions, which empowers the Department of  
3     Justice to take action against spammers and to levy  
4     fines and to include penalties that would run up to five  
5     years of jail time for certain violations.

6             Then it has civil provisions, so I wanted to  
7     take first the criminal provisions, talk a little bit  
8     about whether the criminal provisions included in the  
9     Act are adequate, how they might be changed and whether  
10    you think the penalties, the criminal penalties again  
11    for significant financial fines and then jail time up to  
12    five years, whether those are adequate as a deterrent.

13            MS. FOX: Well, how many cases have been  
14    brought?

15            MS. HARRINGTON-MCBRIDE: I think it's under half  
16    a dozen, but I don't want to say that that's  
17    authoritative, but that's my anecdotal understanding.

18            MS. FOX: This is Jean Ann Fox, CFA. My  
19    impression has been that the criminal law is not  
20    particularly effective with marketplace problems, that  
21    cases are so rarely brought, and that may not be so with  
22    international obviously fraudulent spam, but by and  
23    large, the criminal enforcement folks are busy with  
24    crime where there's blood in the streets or terrorists  
25    involved or something else. If you rely on criminal  
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1 sanctions to regulate the marketplace, it's going to be  
2 very episodic.

3 MS. SHERRY: This is Linda Sherry, Consumer  
4 Action. The impression of most of the cases I've seen  
5 reported, and I could be totally off base here, is that  
6 they were settled out with no jail time.

7 MS. GRANT: This is Susan Grant from National  
8 Consumers League. I think there have been some cases  
9 where big spammers have actually gone to jail.

10 MS. FOX: That's pursuant to Virginia state law.

11 MS. GRANT: Right.

12 MS. FOX: But not under CAN-SPAM, right?

13 MS. GRANT: Maybe under a combination of state  
14 and federal law.

15 MS. FOX: I don't object to it.

16 MS. GRANT: Right, criminal penalties are  
17 helpful, especially for really egregious situations, and  
18 should be really widely publicized when they occur so  
19 that that can perhaps have some sort of deterrent  
20 effect. It's one part of an overall strategy of dealing  
21 with it obviously. It's not enough in and of itself  
22 because I think as Jean Ann rightly pointed out, that's  
23 not going to be an action that is taken in every case.

24 MS. HARRINGTON-MCBRIDE: Okay. Well, let's talk  
25 some about the civil provisions. These are particularly  
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1 near and dear to our hearts because the FTC has civil  
2 enforcement authority, but not criminal.

3 We'll take these just seriatim, so if you can  
4 just imagine sort of leaping through the Act, that's  
5 what we're going to do. The prohibition that the Act  
6 contains on false header information, this is a  
7 provision that applies to both commercial or  
8 transactional Email, and in fact it's the only provision  
9 in the Act that would apply to transactional or  
10 relationship Email, and I wonder what you all think  
11 about this provision, if it accomplishes what it sets  
12 out to, and whether there are any way in which it could  
13 be improved.

14 MS. SHERRY: I'm sorry, which part of it  
15 exactly?

16 MS. HARRINGTON-MCBRIDE: The prohibition on  
17 false header information.

18 MS. SHERRY: Okay.

19 MS. FOX: A lot of the folks who Email me have  
20 not gotten the message. Right?

21 MS. GRANT: Yes, this is Susan Grant from  
22 National Consumers League. That still seems to be a  
23 rampant problem.

24 MS. SHERRY: I think as with anything, this is  
25 Linda Sherry with Consumers Action, it seems the big  
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1 people, the big bad actors will be perhaps targeted,  
2 while it seems that there are many smaller people out  
3 there doing it and that aren't going to get caught in  
4 the webs because it's too difficult to chase them down,  
5 so it's going to be the high profile violators who are  
6 the ones, and that does send a message, but it also  
7 allows the small time guys to go ahead and keep on  
8 going.

9 MS. HARRINGTON-MCBRIDE: All right. The Act  
10 contains a similar prohibition on deceptive subject  
11 lines. This is something that the FTC has been active  
12 in bringing suits under those kinds of provisions, under  
13 Section 5 authority under the Federal Trade Commission  
14 Act. These are now included in the CAN-SPAM Act and  
15 they are now explicit violations of the law.

16 Any thoughts about specifically the deceptive  
17 subject line provision?

18 MS. GRANT: This is Susan Grant. Most of the  
19 spam that comes into my inbox has a deceptive subject  
20 line.

21 MS. FOX: Yes.

22 MS. HARRINGTON-MCBRIDE: Okay.

23 MS. SHERRY: Whatever the law is, this is Linda  
24 Sherry, I don't think it's working too well right now.

25 MS. HARRINGTON-MCBRIDE: Okay. Probably the  
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1     thing that CAN-SPAM is most recognizable for is the fact  
2     that it includes provisions that allow individual  
3     recipients to opt-out of individual Emails.

4             For those of you, my friends, who worked on  
5     telemarketing for more years than I have, not just  
6     similar to the company specific Do Not Call approach.  
7     What are your thoughts about the Act opt-out provision  
8     and how they play out for consumers?

9             MS. FOX: This is Jean Ann fox from CFA. We  
10    think that that is the weak failing point in the Act,  
11    that it puts the burden on consumers in having to  
12    opt-out each time. I don't opt-out because I'm afraid  
13    that if I click on any link in the message, that  
14    something terrible will happen, and I think this is just  
15    a major failing of the original law.

16            MR. DEGRAFF: This is Kenneth at Consumers  
17    Union. No one has seriously suggested that consumers  
18    actually take advantage of the opt-out provision of the  
19    law, because of real concerns that it merely does  
20    either, A, nothing at all, or B, confirms to the spammer  
21    that the e-mail address is live and active.

22            MS. FOX: It somehow lets you download Spyware  
23    or some other nasty thing on your computer.

24            MS. GRANT: This is Susan Grant from National  
25    Consumers League. I agree with everything that people  
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1     have said and would also point out that even if it's a  
2     myth, that it confirms that your Email address is good,  
3     the fact is it's a pain in the neck.

4             Not only do you have to do it, which is more  
5     complicated than just deleting the spam, usually  
6     requires a few steps on your part to do, but how the  
7     heck would you ever be able to remember who you opted  
8     out with in the onslaught of spam that you get to see  
9     whether or not you're getting more messages from the  
10    same companies?

11            It's just an impossible burden for consumers,  
12    and I doubt very much that people do it and even well  
13    educated and motivated people like us don't do it very  
14    often. I'm certainly very sporadic when I bother to do  
15    it and when I don't, and I truly couldn't tell you how  
16    big of a difference it's making.

17            MS. SHERRY: This is Linda at Consumer Action.  
18    I think it's kind of always reminded me, when I just  
19    looked at it, is we get a lot of junk faxes at our San  
20    Francisco office. We were getting a lot, and every time  
21    we would call the 800 number to opt-out, we would find  
22    that although it was a similar company or even the same  
23    company, they would just switch 800 numbers, so you  
24    would call the 800 number and you would say, Take me off  
25    your list, and you would get one the next day from  
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1       somebody with a different 800 number.

2               When we would Google them and things we would  
3       find out that these were all the same companies really,  
4       but they felt somehow they had narrowly interpreted the  
5       law to say that you only have to opt-out of that one 800  
6       number, and that reminds me of a lot of what's happening  
7       with some of these Emails. There are mass marketers out  
8       there sending on behalf of many different products and  
9       services and also just complete junk, porn and the rest  
10      of it, and even if you opted out of one thing, it  
11      doesn't mean you've opted out of that entire larger  
12      company's offerings, and I think that there should be  
13      some mechanism to force that hand.

14             MS. GRANT: This is Susan Grant from National  
15      Consumers League again. It shouldn't be compared to Do  
16      Not Call. It's in no way similar to Do Not Call. There  
17      is no blanket protection from receiving unsolicited  
18      commercial Emails under CAN-SPAM, and it certainly  
19      hasn't had the dramatic and positive impact on our  
20      inboxes that Do Not Call has had on our telephones.

21             MS. HARRINGTON-MCBRIDE: Susan, I'm sorry. Did  
22      I instigate that comment? This is Katie. What I was  
23      saying was the provision in CAN-SPAM I think is more  
24      analogous to the company specific opt-out that the  
25      original TSR contained.

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1 MS. GRANT: Oh, okay. Sorry, I misunderstood.

2 MS. HARRINGTON-MCBRIDE: Someone else may have  
3 always mentioned Do Not Call, but that's all I was  
4 trying to say is that it's a one by one process. It's  
5 not a blanket opt-out.

6 MS. GRANT: Yes, it's as bad as the company  
7 specific Do Not Call request right that consumers had  
8 only to rely on before the creation of the National  
9 Registry

10 MR. DEGRAFF: This is Kenneth at Consumers  
11 Union. That's exactly right, Susan. Imagine that a  
12 user installing filtering software or picking an ISP  
13 that is trying to block spam as a no solicitation sign  
14 but that sign is basically unenforceable and users are  
15 forced to tell every solicitor, every Fuller Brush man  
16 and every Avon Calling that you don't want to deal with  
17 that commercial message. It's analogous to that times  
18 ten million.

19 MS. HARRINGTON-MCBRIDE: I think what you have  
20 said has given me a lot of things to ask about. Let me  
21 start with a couple questions. A couple of you have  
22 mentioned fears that come with opt-out, the fear that  
23 you're going to be inundated with additional spam, and  
24 maybe the even more significant fear that you're going  
25 to somehow risk having Malware installed on your  
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1 machine.

2 We would be typically interested in any  
3 evidence, even if it's only anecdotal but obviously the  
4 more concrete the better, any evidence that goes to  
5 demonstrate that there really are inherent risks of harm  
6 to your machine if you click on an opt-out link. I've  
7 seen some these reports in the media, but it's been very  
8 hard for to us flesh out actual incidents, so do you all  
9 have any knowledge of those? That would be great for us  
10 to hear about.

11 MS. SHERRY: Well, this is Linda Sherry,  
12 Consumer Action. Just about a month ago, it was not a  
13 link in an Email, it was a link that popped up under  
14 Google which ostensibly was for something completely  
15 different, but when I clicked on it, something was  
16 downloaded that alerted my anti-virus software,  
17 Wo-wa-wo-wa, we've trapped a little thing here, and  
18 we're going to kill it, and so that's a link in Goggle  
19 inside the browser and the links work the same way, so  
20 it's my feeling that you can definitely hijack  
21 someone's machine or freeze it or by using a link.

22 And if this link is deceptively marked in some  
23 way to opt-out but instead takes you to some porn site  
24 where you're frozen there or allows something benevolent  
25 to be downloaded on your machine, it's technology  
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1 possible.

2 MS. HARRINGTON-MCBRIDE: Any reports of it  
3 happening? Susan, have you heard anything?

4 MS. GRANT: No, I really don't think that  
5 consumers would have a clue how to connect things that  
6 might happen sometime later with a message that they  
7 opened previously. It's just too much of a stretch for  
8 most people to do that.

9 MS. HARRINGTON-MCBRIDE: One thing that I think  
10 has been a common theme in your answers is the  
11 sub-division that very few people will comply with this  
12 opt-out so it's ineffective, and even if they do comply,  
13 it's still a large burden on recipients.

14 Dealing with the first part, do you all have any  
15 data that suggests what the clients rates are with the  
16 opt-out? There have been some studies that we have seen  
17 and some research that we're working on, and I think one  
18 of the points that seems to come across is the outside  
19 research is there may be two different numbers, one for  
20 legitimate brand name concerns, that is they on or  
21 opt-out pretty readily because they're identifiable and  
22 not anonymous, and another, for lack of a better term,  
23 the quote, unquote bad guys.

24 Any data that you all have on that?

25 MR. DEGRAFF: No. I wish I did.  
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1 MS. HARRINGTON-MCBRIDE: If you come across any,  
2 we'll be collecting this for another month or so.

3 The Act includes a requirement for the triad of  
4 disclosures, the first that commercial Email include an  
5 identifier that the message is an advertisement or  
6 solicitation, but the second, that each commercial Email  
7 include clear and conspicuous notice of the recipient's  
8 right to opt-out, and finally, that each commercial  
9 Email include a valid postal address of the sender.

10 Any thoughts about these three disclosures that  
11 have to be included?

12 MS. GRANT: Yes, this is Susan Grant from  
13 National Consumers League. This is one of my pet  
14 peeves. I've never seen any Email, even from legitimate  
15 commercial interests, that talked about your right not  
16 to receive further Email. It's not couched that way.

17 At the bad end of the spectrum, it will say, "If  
18 you have received this message in error," which is a  
19 laugh, but even when they try to be a little bit more  
20 forthright than that, they never say, "You have the  
21 right to do this." They say, "If you don't want to  
22 receive more of these messages, click here," and I think  
23 it's important for people to know that it is a right  
24 that they can exercise and not just something that  
25 someone is inviting them to take advantage of.

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1 MS. HARRINGTON-MCBRIDE: Okay.

2 MS. SHERRY: Linda Sherry. I think one of the  
3 weaknesses to me in the whole Act is that it really  
4 doesn't ban unsolicited Email. So we talked about that,  
5 Jean Ann and I were on the call before, that we would  
6 rather have it be an opt-out and that you would never be  
7 able to be sent Email unless you asked for it,  
8 unsolicited Email.

9 MS. HARRINGTON-MCBRIDE: Okay.

10 MS. SHERRY: Linda Sherry again. It appears no  
11 one is using those headers. I've not seen them.

12 MS. GRANT: Oh, yes. This is Susan Grant.  
13 Labeling indicating that it's an advertisement? No.

14 MS. HARRINGTON-MCBRIDE: Okay. What about the  
15 penalty scheme that the Act includes? There's a  
16 violation of any of the civilly enforced provision. The  
17 various actors who have enforcement authority under the  
18 Act, the FTC, the various State Attorneys General and  
19 Internet access services, we most often think of them as  
20 the ISPs, each have the ability to get money per  
21 violation.

22 Do you think that the amounts are adequate? Do  
23 you think that the whole penalty scheme is adequate?  
24 Has any of it been a deterrent?

25 MR. DEGRAFF: The current penalty in Can-Spam is  
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1 not adequate because it doesn't give the consumers the  
2 right to sue the culprits.

3 MS. GRANT: That's right. This is Susan Grant.  
4 I totally agree. If consumers could either individually  
5 or banding together take action, it would be a further  
6 deterrent. I think it's great that the ISPs are able to  
7 take action and they have, and that's a good supplement  
8 to what government can do, but I think that consumers  
9 feel powerless.

10 MS. SHERRY: I think that per occurrence is a  
11 hard thing to measure. It's a tip of an iceberg sort of  
12 thing when a consumer makes a complaint, and I think  
13 there's far more cases than are ever complained about,  
14 and I feel that the wording of the Act makes it a little  
15 hard to know what the extent of the problem is in terms  
16 of law enforcement going after it.

17 MS. HARRINGTON-MCBRIDE: Okay. Another  
18 provision in the Act's is the aggravated violations  
19 provision that lists out four or five behaviors that  
20 amount to what is called an aggravated violation under  
21 the Act. That is if there's some primary violation of  
22 the provision of the Act and these behaviors are  
23 present, it can lead to trouble damages, and some of  
24 these include Email address harvesting and dictionary  
25 attacks, creation of multiple domains.  
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1           Are these aggravated violations useful?

2           MS. FOX: We're aggravated.

3           MS. SHERRY: They're useful to the spammers. I  
4       mean, it seems like it just is continuing unabated. I  
5       hate to sound so frustrating. It's Linda Sherry,  
6       Consumer Action, but it seems like they are continuing  
7       unabated, these problems.

8           MS. HARRINGTON-MCBRIDE: Okay.

9           MS. GRANT: This is Susan Grant from National  
10      Consumers League. I don't know to what extent they're  
11      being used, so it's awful hard to answer that question.  
12      Certainly I think we can tell from our own situations  
13      that Email harvesting is still going on. For instance,  
14      Email addresses are harvested from National Consumers  
15      League's web site and then used for spam all the time.

16          MS. SHERRY: Same with us.

17          MS. HARRINGTON-MCBRIDE: A couple of you have  
18      mentioned the preference for an opt-in regime as opposed  
19      to the opt-out scheme adopted in CAN-SPAM. You all know  
20      we've released a report, the FTC did, last June on a Do  
21      Not Email Registry, in which we did a fair amount of  
22      analysis of what we believe to be the efficacy of that  
23      scheme and at that time with what we knew  
24      technologically about how to find spammers.

25           I guess I wonder what, if anything, you have to  
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1 say about the continuing difficulty in identifying  
2 spammers and whether or not you believe that an opt-in  
3 regime would be more effective given the problems of  
4 anonymity?

5 MS. SHERRY: The problems of anonymity meaning  
6 what?

7 MS. HARRINGTON-MCBRIDE: Meaning it's very  
8 difficult to trace who sends spam.

9 MS. SHERRY: Oh, yes.

10 MS. GRANT: This is Susan Grant from National  
11 Consumers League. The thing is that unless it's a virus  
12 kind of situation, as people have said before, there's  
13 usually a money trail to follow because they're trying  
14 to get you to buy something so although it can be really  
15 difficult, it appears that you should be able to  
16 ultimately track down who it is, if you are an agency  
17 that has the resources to do that.

18 MS. HARRINGTON-MCBRIDE: Okay. I think we've  
19 talked a fair amount about the sexually explicit  
20 labeling requirement. Any other thoughts there? I  
21 think if I can summarize, your thoughts were that it  
22 wasn't particularly efficacious.

23 MS. GRANT: Right. That's a succinct  
24 description. This is Susan.

25 MS. HARRINGTON-MCBRIDE: We're paying by the  
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1 word so, only kidding. Feel free to say what you like.

2 There's another provision in the Act which  
3 prohibits promotion of a person's trade or business in a  
4 commercial Email if there's false or misleading header  
5 information, again sort of designed to get not so much  
6 as the button pusher but the person who's services are  
7 advertised. Any thoughts about that provision and its  
8 usefulness?

9 I'm guessing that you'll have a different  
10 response to my next question. What are your thoughts  
11 about the preemption of state law by the CAN-SPAM Act?  
12 Yen

13 MS. FOX: We don't like it.

14 MS. SHERRY: It's unfortunate.

15 MS. GRANT: This is Susan Grant. I don't see  
16 how that's helpful.

17 MS. HARRINGTON-MCBRIDE: For there to be  
18 preemption?

19 MS. GRANT: That's right.

20 MS. SHERRY: Exactly.

21 MR. DEGRAFF: CAN-SPAM's preemption of state law  
22 has dramatically hurt state's efforts to find creative  
23 ways to end the problem of spam. There might be new  
24 ideas that could be implemented on a trial basis by a  
25 state or even on a small scale by a state that could be  
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1 generally applicable to the country that will never see  
2 the light of day because of federal preemption.

3 MS. HARRINGTON-MCBRIDE: Finally, any thoughts  
4 about the wireless rule making that was conducted by our  
5 sister agency, the Federal Communications Commission?  
6 They were required pursuant to the Act to do a  
7 rulemaking within I think 270 days of the passage of the  
8 Act, so I think last September was when they promulgated  
9 their rule on wireless Email.

10 MS. GRANT: This is Susan Grant from National  
11 Consumers League. I think that we were happy with where  
12 they came out compared to where they started out in  
13 their proposed notice of rulemaking; for instance, not  
14 allowing an exception for commercial messages from the  
15 wireless provider, but to the extent that the FCC rules  
16 mirror the FTC's in terms of things like opt-in or  
17 opt-out, they're no more helpful really to consumers  
18 than the FTC rules.

19 MS. HARRINGTON-MCBRIDE: Okay. I want to thank  
20 you all for taking time to talk with us this afternoon.  
21 As I noted at the beginning, this is one of a series of  
22 interviews that we're conducting, and these interviews  
23 are just one of a series of steps we're taking to try to  
24 do the best we can to gather information that will be  
25 pertinent to this report to Congress so that we can best  
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1     advise Congress as to the efficacy of the current law  
2     and any recommendations for change, and I appreciate you  
3     taking time out of your schedule.

4             I know some of you were already off at other  
5     places, doing other things, not even at your usual desk,  
6     so I appreciate in particular your willingness to tear  
7     yourself away from other activities. And I just want to  
8     encourage you that if you do think of anything  
9     additional that you would like to add or if you have any  
10    particular data sources, whether they be individual  
11    studies, articles, surveys, anything you can think of  
12    that you're not sure it's worth taking a look at, pretty  
13    much assume nothing. We've collected an awful lot of  
14    data, but there's so much out there on CAN-SPAM, we  
15    don't want to miss something.

16            Feel free to contact us by Email. My Email  
17    address is cmcbride@ftc.gov, C M C B R I D E @ F T C . G  
18    O V. We'll be collecting this information through  
19    August, and we would much appreciate it if you would be  
20    thoughtful enough to send us anything that you may come  
21    across in the coming weeks.

22            I also want to let you know that once the  
23    transcript from today's call is available, it will be  
24    circulated to all participants so that you may have an  
25    opportunity to review and correct. Because there are so  
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1     many participants on our various calls, it would be very  
2     helpful to us if you would make your corrections in red  
3     line format and send us that red line.

4             We'll be asking for fairly quick turn around, so  
5     we would appreciate your help in that. Allyson  
6     Himelfarb is the contact person for that, and she'll be  
7     in touch with you just as soon as the transcripts are  
8     ready.

9             So again, thank you very much for your time, and  
10    we'll look forward to hearing from you in the future as  
11    we continue our work in this area.

12            Thank you very much.

13            (Whereupon, at 4:35 p.m. the conference was  
14    concluded.)

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## 1 CERTIFICATE OF REPORTER

2

3 DOCKET/FILE NUMBER: P044405

4 CASE TITLE: REPORT TO CONGRESS

5 HEARING DATE: JULY 2005

6

7 I HEREBY CERTIFY that the transcript contained  
8 herein is a full and accurate transcript of the steno  
9 notes transcribed by me on the above cause before the  
10 FEDERAL TRADE COMMISSION to the best of my knowledge and  
11 belief.

12

13 DATED: AUGUST 8, 2005

14

15

16

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DEBRA L. MAHEUX

17

18

## CERTIFICATION OF PROOFREADER

19

20 I HEREBY CERTIFY that I proofread the  
21 transcript for accuracy in spelling, hyphenation,  
22 punctuation and format.

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24

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